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U.S. Armed Forces and Homeland Defense

The Legal Framework

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Introduction

With the recent terrorist attacks on America in New York and Washington, it is now clearly understood that the defense of the United States at home is as urgent and important a mission for our government as is our defense effort abroad. This development has been anticipated. After the end of the Cold War, measures to defend the American homeland against terror attacks, especially attacks with weapons of mass destruction (WMD), have received increasing attention by defense experts and have been addressed by several government commissions.

Now the emphasis is shifting from study to action. In his address to Congress 10 days after the attack, President Bush announced the creation of a cabinet-level position, reporting directly to the president, to head an Office of Homeland Security. "Today," president Bush said, "dozens of federal departments and agencies, as well as state and local governments, have responsibilities affecting homeland security." One of these departments, surely, is the Department of Defense (DOD). Indeed, minutes after the three terrorist air strikes of September 11, our fighter aircraft were on patrol over New York and Washington to protect against further attacks. But the DOD and the armed forces will have to contribute in many other ways to protect U.S. territory from devastating attack.

A study published in January 1999 by the Center for Strategic and International Studies noted the continuing proliferation of biological and nuclear weapons and concluded that "[i]t will have to be a priority mission of the … [DOD] to develop, deploy, and operate a wide range of defensive measures for the protection of the U.S. homeland."[1] The National Commission on Terrorism, in its report of June 2000, endorsed this conclusion, stating that

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[1] Fred C. Iklé, *Defending the U.S. Homeland: Strategic and Legal Issues for DOD and the Armed Services* (CSIS, 1999).

> when a catastrophe is beyond the capabilities of local, state, and other federal agencies, or is directly related to an armed conflict overseas, the President may want to designate DOD as a lead federal agency. This may become a critical operational consideration in planning for future conflicts. Current plans and exercises do not consider this possibility.[2]

Questions have been raised, however, about the president's authority under our Constitution and laws to entrust DOD with such missions, absent explicit direction by Congress. Some have claimed that the Constitution imposes firm limitations on the use of the armed forces in most roles within the United States. Others have expressed fears that DOD might arrogate to itself functions, such as law enforcement or domestic intelligence, that are best left to the Justice Department. Still others have raised the specter of suppression or compromise of civil liberties as a result of military operations within the United States. It is the purpose of the present report to answer these questions. The supposed inadequacy of legal authority and the mistaken claims about legal restrictions, if not cleared up, will inhibit our preparation for large-scale terror attacks. Civilian and military leadership will be reluctant to take action without a clear understanding of their legal authority.

Thus, this report discusses the nature and extent of the president's authority, in light of these new threats, to assign the armed forces a major role in domestic defense. In particular, it provides a framework within which to consider fundamental legal considerations that arise in the context of the military's involvement with homeland defense.

Part I of this report sets forth briefly the conclusions of this study. Part II discusses the origin of the president's authority under Article II of the Constitution, and the powers that the Founding Fathers specifically entrusted to that office to provide for the nation's security. Part III reviews leading decisions of the Supreme Court on the president's employment of military forces in domestic crises, whether as an incident of his own independent constitutional authority or pursuant to federal statute. Part IV discusses specific statutes that bear on domestic military activities, including various statutes that explicitly contemplate the president's use of the military in time of serious emergency. Finally, Part V examines the *Posse Comitatus* Act which some believe—incorrectly—may limit the president's options in this context.

I. Conclusions

The principal conclusions of this analysis may be stated succinctly.

- In crafting Article II, the framers of the Constitution sought to ensure that the president could respond promptly in time of war, insurrection,

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[2] National Commission on Terrorism, *Countering the Changing Threat of International Terrorism* 39 (GPO, 2000), at http://w3.access.gpo.gov/nct.

or other serious emergency, and that in such circumstances his power always would suffice to provide for the nation's safety. His office was designed, as Alexander Hamilton said, to serve as "the bulwark of the national security."

- The president unquestionably has the authority to use the armed forces to repel an invasion of or respond to an attack on the United States. Acting on their own independent constitutional authority as well as pursuant to laws enacted by Congress, presidents also have used military forces to respond to a wide variety of domestic crises. The Supreme Court consistently has upheld the president's authority to do so. Its decisions recognize that, even in the absence of congressional direction, the Constitution obliges the president to maintain and defend the "peace of the United States." He therefore may use all means at his disposal, including the armed forces, when a domestic emergency so requires.
- No matter what responsibilities for homeland defense the president might entrust to DOD, *all* military activities would remain under effective civilian control, exercised through civilian command authorities. Moreover, the question of whether the president lawfully may call upon the military is separate from the question of what particular roles the military may, should, or must assume in a domestic crisis. As the Supreme Court has emphasized, the Constitution is a law "equally in war and peace," and the maintenance of an orderly civilian government is an overriding objective. Any extraordinary governmental actions that intrude on constitutionally guaranteed civil liberties are impermissible absent the most compelling justification. Any emergency powers exercised by the president, with or without Congress's authorization, must extend no further than circumstances absolutely require, must be temporary in character, and are subject to judicial review.
- Existing statutes—including the Insurrection Act and the Stafford Act—grant the president broad powers that he may invoke in the event of a domestic emergency, including a WMD attack. These statutes specifically authorize the president to call upon the armed forces to help restore public order, and they anticipate the large role that DOD may play by virtue of the array and depth of the resources it could bring to bear to save lives and protect public health and safety.
- Neither the *Posse Comitatus* Act, nor, apparently, any other statute purports to deny, limit, or condition the president's use of the armed forces in response to a catastrophic terrorist attack on the United States. The *Posse Comitatus* Act does announce our strong national policy that law enforcement is a civilian function, but this policy is significantly limited in its application by the Constitution (including

the president's authority in times of serious emergency), as well as by other specific statutes. Moreover, even where the *Posse Comitatus* statute does apply, only certain kinds of military activity involving the exercise of explicit police powers fall within the prohibition of the act. Other military activities are not prohibited by the statute.

II. The Constitutional Origins of Presidential Authority

Those provisions defining the office and powers of the president reflect the fact that the "Constitution came from the Framers 'a bundle of compromises.'"[3] On the one hand, as James Madison's report of the debates in the Federal Convention of 1787 indicates, the framers agreed on the need to accord the president a significant degree of autonomy.[4] They also agreed on the importance of a unified executive, and they perceived the "great requisites" of this department of government to "vigor, despatch & responsibility."[5] It was recognized that the "conduct" of war necessarily was an executive function and that a president must have the "power to repel sudden attacks."[6] On the other hand, the framers clearly intended to balance the authority of the president against that of a Congress possessed of "all legislative Powers" and of a Senate designed to participate in various important elements of executive authority.[7]

The question of what powers were necessary and appropriate to the office of the president under the Constitution was a major theme in the ratification debate. Shays' rebellion (1786–1787) in Massachusetts starkly underscored the internal perils that the nation faced in the aftermath of the revolution,[8] while the unsettled

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[3] Edward S. Corwin, *The President: Office and Powers, 1787–1984* 353 (Randall W. Bland et al. eds., 5th rev ed.; New York University Press, 1984).

[4] 1 James Madison, *The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America* 37–40 (Gaillard Hunt and James Brown Scott eds., Prometheus Books, 1987).

[5] 1 *id.* at 38 (views of Mr. Randolph); see William Lee Miller, *The Business of May Next: James Madison & the Founding* 89 (University Press of Virginia, 1992). The executive was constituted to be able to "decide quickly and clearly" and to "do those things that we know from experience a legislature is not good at doing,"

[6] 2 Madison, *supra* note 4, at 418–19.

[7] U.S. Const., Art., I, § 1.

[8] *The Federalist* No. 21 (Alexander Hamilton) ("The tempestuous situation, from which Massachusetts has scarcely emerged, evinces that dangers of this kind are not merely speculative") (all citations hereinafter to *The Federalist* are to the 1961 edition published by Wesleyan University Press, edited by Jacob E. Cooke). With New England in the grip of a severe depression following the end of the Revolutionary War, Daniel Shays led a revolt by bankrupt farmers in western Massachusetts that closed the civil courts and forestalled their consideration of actions to collect debts and taxes. In January 1787, only five months prior to the start of the Constitutional Convention in Philadelphia, Governor Bowdoin mobilized a force of 4,400 militia that quelled the uprising. The rebellion demonstrated that "a stronger national government was imperative" and that the new Constitution "must provide against internal insurrection." Broadus Mitchell and

relations of the great European powers called vividly to mind the ever-present threat of foreign hostilities.[9] John Jay accordingly argued that, in fashioning the federal government, "a wise and free people" should first direct their attention to "providing for their safety."[10] Madison asserted that "[s]ecurity against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union."[11]

Alexander Hamilton likewise urged that:

> [I]t is impossible to foresee or define the extent and variety of national exigencies, or the corresponding extent & variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackels can wisely be imposed on the power to which the care of it is committed. This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils, which are appointed to preside over the common defence.[12]

For these reasons, Hamilton stressed the "necessity of an energetic Executive" as a "leading character in the definition of good government," as "essential to the protection of the community against foreign attacks … [and] the steady administration of the laws," and as "the bulwark of the national security."[13] Hamilton concluded that the design of the proposed Constitution was equal to these high purposes, assuring the president would be able to "act with vigor and decision" but nonetheless would be accountable to the people and "friendly to liberty."[14]

Our subsequent history has proved Article II of the Constitution sufficient to guarantee that the president is able to respond, decisively when required, in a wide variety of circumstances endangering the security of the nation. Article II, Section 1 provides that: "The executive Power shall be vested in a President of the United States of America."[15] It further prescribes an oath of office by which the president

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Louise Pearson Mitchell, *A Biography of the Constitution of the United States* 32 (2d ed.; Oxford University Press, 1975). The experience was constantly referred to during the drafting of the Constitution and the subsequent ratification debate as evidence of "the need for congressional and presidential authority to call forth the armed forces to execute the laws." Daniel H. Pollitt, *Presidential Use of Troops to Execute the Laws: A Brief History*, 36 N.C. L. Rev 117, 121 (1958).

[9] See, e.g., *The Federalist* No. 24 (Alexander Hamilton) ("Though a wide ocean separates the United States from Europe; yet there are various considerations that warn us against an excess of confidence or security").

[10] *The Federalist* No. 3 (John Jay) (emphasis omitted).

[11] *The Federalist* No. 41 (James Madison).

[12] *The Federalist* No. 23 (Alexander Hamilton) (emphasis omitted).

[13] *The Federalist* No. 70 (Alexander Hamilton).

[14] *The Federalist* Nos. 70, 71 (Alexander Hamilton).

[15] U.S. Const., Art., II, § 1.

swears to "preserve, protect and defend the Constitution of the United States."[16] Section 2 states in part that "[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."[17] Section 2 also entrusts the president with the power, "by and with the Advice and Consent of the Senate," to make treaties and to appoint ambassadors and other officers of the United States.[18] Section 3 specifies that the president "shall receive Ambassadors and other public Ministers."[19] It also enjoins the president to "take Care that the Laws be faithfully executed."[20]

These and other features of the presidency fortify the office to perform unique, multiple roles—as a head of state elected by all the people, as the nation's representative in foreign relations, as the commander of our armed forces, and as our chief executive. In practice, they also accord the president important additional roles as leader of a national political party and of national public opinion.[21] From the outset, these constitutional grants of power have been considered not singly but in combination[22] to establish the considerable range of a president's lawful prerogatives in answering the needs of the nation, most especially in times of grave crisis.

The argument of this report focuses solely on the proposition that the president has ample legal authority to call upon the armed forces to defend American territory in the event of a sustained or catastrophic terrorist attack on the United States. Nonetheless, it is important to note at the outset that, irrespective of what roles or missions our military forces might undertake at the president's direction in response to such an attack, they would remain under effective civilian control, exercised as it normally is through duly constituted civilian command authorities. No matter what the nature of the contingency facing the president, there would be no occasion to

> break faith with this nation's tradition of keeping military power *subservient to civilian authority*, a tradition which we believe is firmly embodied in the

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[16] *Id*.

[17] U.S. Const., Art., II § 2.

[18] *Id*.

[19] U.S. Const., Art., II, § 3.

[20] *Id*.

[21] George Milton, *The Use of Presidential Power, 1789–1943* 3-5 (Octagon Books, 1980).

[22] As Professor Louis Henkin observed, "[t]he President has more than one hat, he wears them at the same time, and he can act under one or another or all together." Louis Henkin, *Foreign Affairs and the Constitution* 50 (Foundation Press, 1972). This has always been the view of the disparate powers granted to the president under Article II. See, e.g., *Little v Barreme*, 6 U.S. (2 Cranch) 170, 177 (1804) (Marshall, C.J.) (citing the "take Care" clause of Article II, Section 3 and the "commander in chief" powers under Section 2 in support of presidential authority to order seizure of vessels engaged in "illicit commerce," absent action by Congress).

> Constitution. The country has remained true to that faith…. Perhaps no group in the nation has been truer than military men themselves. Unlike the soldiers of many other nations, they have been content to perform their military duties in defense of the nation in every period of need and to perform those duties well without attempting to usurp power which is not theirs under our system of constitutional government.[23]

It also bears emphasizing that the question of the president's authority to call upon the military is separate from the question of what specific functions DOD may, should, or must assume in time of grave domestic crisis. As the Supreme Court has stated, "[t]he Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."[24] While there "resides in the executive branch of the government [the power] to preserve order and insure the public safety in times of emergency," this power does "not extend beyond what is required by the exigency which calls it forth."[25] Thus, the power is "of a most temporary character."[26] It is always subject to judicial review.[27] At all events, the military's most essential objective in a domestic emergency must be "to act vigorously for the maintenance of an orderly civil government."[28] The Supreme Court has held that any extraordinary governmental actions—such as suspension of the normal operation of the writ of habeas corpus, proceedings outside the regular courts of law, or broad restrictions on freedom of movement—are impermissible under our Constitution absent the most compelling justification.[29]

Moreover, DOD's role in homeland defense would not detract from the important missions performed by numerous other arms of federal and state government. In particular, the Department of Justice and Federal Bureau of

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[23] *Reid v Covert*, 354 U.S. 1, 40 (1957) (emphasis added).

[24] *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21; see *Reid*, 354 U.S. at 35 n. 62.

[25] *Duncan v Kahanamoku*, 327 U.S. 304, 335 (Stone, C. J., concurring).

[26] *Id*. at 326 (Murphy, J., concurring).

[27] *Id*. at 336 (Stone, C. J., concurring).

[28] *Id*. at 324 (emphasis added).

[29] See, e.g., *Duncan*, 327 U.S. at 326 (Murphy, J., concurring) ("when a foreign invasion or civil war actually closes the courts and renders it impossible for them to administer criminal justice") (military tribunals); *Korematsu v United States*, 323 U.S. 214, 218, 220 (1945) ("gravest imminent danger to the public safety"; "under circumstances of direst emergency and peril … when under conditions of modern warfare our shores are threatened by hostile forces") (exclusion order); *Hirabayashi v United States*, 320 U.S. 81, 94-95 (1943) ("at a time of threatened air raids and invasion") (curfew); *Sterling v Constantin*, 287 U.S. 378, 401 (1932) ("in the theatre of actual war") (prohibiting the use of private property); *Milligan*, 71 U.S. at 127 (where "no power is left but the military" and "in the locality of actual war") (writ of *habeas corpus*); *Mitchell v Harmony*, 54 U.S. (13 How.) 115, 134 (1851) ("where the action of the civil authority would be too late") (seizure of property); *Luther v Borden*, 48 U.S. (7 How.) 1, 45 (1849) (in "a state of war" and "armed insurrection too strong to be controlled by the civil authority") (search).

Investigation would continue to perform their distinctive law enforcement and domestic intelligence missions. As a practical matter, the better we have anticipated and properly prepared DOD to play its unique and necessary role in response to a catastrophic terrorist attack, the less concerned we need be that the military will exceed its proper functions.

III. The "Extent and Variety of National Exigencies"

"Congress and the President, like the courts, possess no power not derived from the Constitution. But one of the objects of the Constitution, as declared by its preamble, is to 'provide for the common defence.'"[30] The Supreme Court has had occasion to consider the lawful powers of the president to respond in times of national emergency, including by means of the armed forces. Even a brief review of the court's leading decisions in this area demonstrates that presidential authority has at all times been equal to the "extent and variety of national exigencies," as Alexander Hamilton urged in *The Federalist* papers.[31]

In construing the nature of the president's power to employ military forces, the Supreme Court traditionally has emphasized that, "[a]s commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy."[32] The court's decisions also have been highly attentive to the fact that it is "impossible to define the particular circumstances of danger or necessity" that a president may face as commander in chief,[33] or the "imperative military necessity" that may arise "in time of war or of immediate and impending public danger."[34] The president accordingly has been assured the ability to exert broad independent authority over the conduct of military operations.[35] Especially in light of the nature of modern warfare, the power of the president to use the armed forces and do "anything else necessary" to

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[30] *Ex parte Quirin*, 317 U.S. 1, 25–26 (1942) (quoting U.S. Const., Prmbl.). Article IV, Section 4 of the Constitution specifically provides, for example, that the United States shall protect each state "against Invasion," and at the request of a state shall protect the state "against domestic Violence."

[31] *The Federalist* No. 23 (Alexander Hamilton).

[32] *Fleming v Page*, 50 U.S. (9 How.) 603, 615 (1850). The court also found that President Lincoln was "undoubtedly authorized" as commander in chief during the Civil War to gather intelligence in aid of the war effort through the use of "secret agents." *Totten v United States*, 92 U.S. 105 (1875).

[33] *Mitchell*, 54 U.S. at 134.

[34] *United States v Russell*, 80 U.S. (13 Wall.) 623, 627 (1871).

[35] As President and later Chief Justice William Howard Taft observed, the commander in chief "can order the army and navy anywhere he will, if the appropriations furnish the means of transportation." Henkin, *supra* note 22, at 307 (quoting W. H. Taft, *Our Chief Magistrate and His Powers* 94–95 (Columbia University Press, 1916)).

repel an invasion or respond to an attack on the United States "is beyond question."[36]

From our earliest history, Congress has anticipated the need and, by statute, has directed or authorized the president's use of military forces in time of domestic crises. The Whiskey Rebellion, for example, broke out in the four western counties of Pennsylvania following certain tax measures passed by Congress in 1791. Congress responded with passage of the Calling Forth Act for the militia in 1792 and again in 1795 to authorize President Washington to call the militia into service when necessary to "suppress insurrections" and "repel invasions."[37]

Following our declaration of war against Britain in June 1812, however, governors in New England refused to mobilize their state militias when called into service by President Madison. The governors argued that the militias could be used only for limited purposes, and that they (not the president) had the lawful right to determine when a call up was necessary.[38] In *Martin v Mott*, the Supreme Court upheld Madison's decision under the Act of 1795 to call the militia into service during the War of 1812.[39] Writing for a unanimous Supreme Court, Justice Story stated:

> [T]he authority to decide whether the exigency has arisen[] belongs *exclusively to the President*, and … his *decision is conclusive* upon all other persons…. [T]his construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopard the public interests…. [T]hese powers must be so construed as to the modes of their exercise as not to defeat the great end in view…. Besides, in many instances, the evidence upon which the President might decide that there is imminent danger of invasion, might be of a nature not constituting strict technical proof, or the disclosure of the evidence might reveal important secrets of state, which the public interest, and even safety, might imperiously demand to be kept in concealment.[40]

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[36] Henkin, *supra* note 22, at 52.

[37] An Act to Provide for Calling Forth the Militia to Execute the Laws of the Union, 1 Stat. 264 (1792); An Act to Provide for Calling Forth the Militia to Execute the Laws of the Union; 1 Stat. 424 (1795).

[38] Allan R. Millett and Peter Maslowski, *For the Common Defense: A Military History of the United States of America* 103 (Free Press, 1984).

[39] 25 U.S. (12 Wheat.) 19 (1827).

[40] *Id*. at 30–31 (emphasis added).

Similarly, in *Luther v Borden*, the Supreme Court considered President John Tyler's mobilization of Massachusetts and Connecticut militia pursuant to the Act of 1795.[41] The mobilization was ordered in response to the request of the governor of Rhode Island for help to quell Dorr's Rebellion of 1842, an attempt of a presumed new government to forcibly overthrow the established government in Rhode Island. The court upheld the president's exercise of his authority under the 1795 statute, as it previously did in *Martin v Mott*:

> It is said that this power in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual. When citizens of the same State are in arms against each other, and the constituted authorities unable to execute the laws, the interposition of the United States must be prompt, or it is of little value…. And the elevated office of the President, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against a willful abuse of power as human prudence and foresight could well provide. At all events, *it is conferred upon him by the Constitution* and laws of the United States, and must therefore be respected and enforced in its judicial tribunals.[42]

In other cases, however, the president has been required to act on his own constitutional authority, either alone or in advance of Congress and its legislative process. Indeed, prior to Congress's enactment of a statute authorizing the use of federal forces to execute the laws, our first three presidents—Washington, Adams, and Jefferson—each used the regular army for this purpose, relying on their inherent authority.[43]

In the *Prize Cases*, the Supreme Court considered whether, in the absence of congressional authorization, President Lincoln had the right to blockade the ports of southern states following the attack on Fort Sumter in 1861.[44] The blockade was one of several emergency measures taken by Lincoln on his own constitutional authority at the outset and during the course of the Civil War.[45]

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[41] 48 U.S. at 1 (1849).

[42] *Id*. at 44 (emphasis added). To similar effect, see *Sterling*, 287 U.S. at 399–400.

[43] Note, *Honored in the Breech: Presidential Authority to Execute the Laws with Military Force*, 83 Yale L.J. 130, 134, 134 n. 36 (1973); see generally, Abraham D. Sofaer, *War, Foreign Affairs and Constitutional Power* (Ballinger, 1976).

[44] *In re The Amy Warwick*, 67 U.S. (2 Black) 635 (1862) [hereinafter *Prize Cases*].

[45] Others included calling volunteers into service, increasing the size of the navy and regular army, expending funds without congressional appropriations, restricting postal services, suspending the writ of *habeas corpus*, and later, issuing the Emancipation Proclamation. Lincoln argued that the blockade and other emergency measures taken at the outset of the war were "strictly legal," and advised Congress that "the duty of employing the war-power, in defense of the government [was] forced upon him." See David Herbert Donald, *Lincoln* 303 (Simon & Schuster, 1995). Congress promptly approved bills retroactively approving the president's actions. *Id*. at 303–05.

With respect to Lincoln's deploying naval forces for this purpose, the Supreme Court noted that "[t]his greatest of civil wars" had "sprung forth suddenly," that the "President was bound to meet" the crisis "without waiting for Congress," and that he clearly was authorized to do so under the Constitution:

> The Constitution confers on the President the whole executive power. He is bound to take care that the laws be faithfully executed. He is Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States … [B]y the Acts of Congress…, he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States. If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force, by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war….[46]

The court in the *Prize Cases* observed that while a civil war may not be "solemnly declared," it nonetheless may give rise to a formal state of war "by its accidents—the number, power, and organization of the persons who originate and carry it on."[47] Taking notice that such a state of war existed in April 1861, the court deferred to the president to determine the appropriate response to the crisis:

> Whether the President in fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the Political Department of the government to which this power was entrusted.[48]

Thus, the Supreme Court confirmed Lincoln's "war power." Based on the president's broad "executive" role, his duty to "take Care" that the Constitution and laws are faithfully executed, and his authority as commander in chief, the court upheld his decision to mobilize the armed forces, without authorization by Congress, to meet an unprecedented domestic crisis.

More generally, as the Supreme Court held in *Cunningham v Neagle*, the powers of the president simply are not "limited to the enforcement of Acts of Congress," but include "rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution[.]"[49] "[T]hat there is a peace of the United States" which a president is obliged to maintain and defend, even in

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[46] *Prize Cases*, 67 U.S. (2 Black) at 668–69.

[47] *Id*. at 666.

[48] *Id*. at 670.

[49] 135 U.S. 1, 64 (1890).

the absence of congressional authorization, is "too clear to need argument."[50] In *Cunningham*, the court found that the president—although nowhere authorized by Congress to do so—had inherent authority to "take measures for the protection" of a Supreme Court justice threatened with personal attack while discharging his duties.[51] As to the source of this authority, the court cited Article II, Section 3's injunction that the president "take Care that the Laws be faithfully executed," as well as the president's commander in chief powers in Section 2.[52]

Similarly, in *In re Debs*, the court held that the president was not "impotent" to protect interstate commerce and interstate mail transportation from disruption during the Chicago Pullman strike in 1895.[53] In upholding an injunction against union officials, the court stated that the president could enforce the "rights of the public" and the "peace of the nation" by other means as well: "If the emergency arises, the army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws."[54] In 1894, President Grover Cleveland in fact had sent federal troops into Chicago to enforce the injunction against Eugene Debs and the American Railway Union. When the governor of Illinois demanded that the troops be withdrawn, Cleveland replied, "I have neither transcended my authority nor duty in the emergency that confronts us."[55] More recently, the president likewise has used troops of the regular army as well federalized national guard units to enforce the execution of judicial decrees issued in civil rights cases and for other purposes.[56]

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[50] *Id*. at 69. This same concept of the president as a "steward of the people" was articulated by Theodore Roosevelt in his autobiography:

> I declined to adopt the view that what was imperatively necessary for the nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or the by the laws.

Henkin, *supra* note 22, at 40 (quoting T. Roosevelt, *An Autobiography* 371-72 (Macmillan, 1914)).

[51] *Cunningham*, 135 U.S. at 67.

[52] U.S. Const., Art., II, § 3, quoted in *Cunningham*, 135 U.S. at 64.

[53] 158 U.S. 564, 581 (1895); see also *Ex parte Siebold*, 100 U.S. 371, 395 (1879) ("We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, … command obedience to its laws, and hence … keep the peace to that extent").

[54] *Debs*, 158 U.S. at 582.

[55] Pollitt, *supra* note 8, at 141 (quoting Allan Nevins, *Grover Cleveland, A Study in Courage* 626 (Dodd, Mead & Co., 1933)); see Clayton D. Laurie and Ronald H. Cole, *The Role of Federal Military Forces in Domestic Disorders, 1877–1945* (GPO, 1997).

[56] See, e.g., *Laird v Tatum*, 408 U.S. 1, 4-5 (1972) (civil disturbances following the assassination of the Rev. Martin Luther King, Jr.); *Cooper v Aaron*, 358 U.S. 1, 13 (1958) (school desegregation order in Little Rock, Arkansas); 41 Op. Att'y Gen. 313 (1957) (the president has "the undoubted power, under the Constitution and laws of the United States, to call the National Guard into service

Undoubtedly, Article II of the Constitution guarantees the president more latitude in foreign than in domestic affairs. As John Marshall argued in 1800, in our "external relations" the president is "the sole organ of the nation" and its "sole representative with foreign nations."[57] In the "vast external realm, with its important, complicated, delicate and manifold problems," the president accordingly has:

> a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war.[58]

By contrast, in domestic matters, the powers of the president are decidedly interdependent and reciprocal with those of Congress. Justice Jackson described this interdependence in his concurring opinion in *Youngstown Sheet & Tube Co. v Sawyer* as follows: where a president acts *with* the sanction of Congress, "his authority is at its maximum"; where he acts *contrary* to congressional direction, "his power is at its lowest ebb"; and where he acts in the *absence* of any congressional direction, there may be "a zone of twilight" in which the distribution of constitutional power is uncertain.[59] In this third category, Justice Jackson wrote, "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[60]

In *Youngstown Sheet & Tube*, the Supreme Court considered the action of President Truman, following a labor dispute, to seize steel mills nationwide to continue essential production during the Korean War. The court overruled the president, finding that the seizure was contrary to the evident intent of Congress as reflected in the labor relations laws, which contemplated other means to resolve the dispute. Nonetheless, in the absence of such legislation by Congress, it would appear that a clear majority of the Supreme Court in *Youngstown Sheet & Tube* would have agreed first, that the president "does possess 'residual' or 'resultant' powers over and above, or in consequence of, his specifically granted powers" to take at least temporary actions in the case of a serious national emergency; and second, that the court would defer to the president's reasonable finding of such an emergency as a question for the "political" departments of government.[61]

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and to use those forces, together with such of the Armed Forces as [is] considered necessary, to suppress … domestic violence, obstruction and resistance of law").

[57] Speech of John Marshall, 10 *Annals of Congress* 613 (1800), reprinted in 18 U.S. (5 Wheat.) app. 26 (1820).

[58] *United States v Curtiss-Wright Export Corp*., 299 U.S. 304, 319–20 (1936).

[59] 343 U.S. 579, 635, 637 (1952) (Jackson, J., concurring).

[60] *Id*. at 637 (Jackson, J., concurring).

[61] Edward S. Corwin, *The Steel Seizure Case: A Judicial Brick Without a Straw*, 52 Colum. L. Rev 53, 65–66 (1952).

The proposition that Article II of the Constitution endows the president with certain inherent emergency powers is altogether more compelling when considered in the context not of a wartime labor dispute, but of a sustained or catastrophic terrorist attack on U.S. territory. Our history records no precedent for such an attack, which would have grave implications for the conduct of *both* domestic *and* foreign affairs. A global response may be required, including coordinated military actions both outside and inside the United States; urgent diplomatic, law enforcement, and intelligence efforts; and massive response by federal and state civilian authorities. No less than Lincoln in the Civil War, the president may be obliged to answer the challenge to the nation's security by resort to the full panoply of his constitutional powers, without waiting for any special legislative authority.

This brief review of the origins of the president's Article II powers and the manner in which they have been interpreted by the Supreme Court demonstrates at least this: as the framers intended, the aggregate "national security power" of the president has always sufficed to respond to the most compelling needs of the nation. Where circumstances have so required, presidents have not been impeded in their use of the armed forces to address severe crises of domestic origin any more than to defend against foreign attack. It is foreseeable that, in the event of a sustained or catastrophic terrorist attack on the United States, the president would call upon the DOD to deploy military assets in essential domestic as well as international missions. Under the Constitution, there should be no doubt about a president's lawful ability to do so.

IV. Principal Statutory Authorities in Domestic Emergencies

Congress previously has addressed the need for the president to respond to unforeseeable domestic emergencies. Pursuant to a variety of statutes, the president may act with the explicit sanction of Congress, assuring that his authority is "at its maximum," as Justice Jackson described it in *Youngstown Sheet & Tube*.[62] Existing statutes grant the president broad powers that he may invoke in the event of a domestic emergency, including a WMD attack. These statutes specifically authorize the president to call upon the armed forces to help restore public order, and they anticipate the large role DOD may play by virtue of the array and depth of the resources it could bring to bear to save lives and protect public health and safety. Most significantly, *no statute*—including the *Posse Comitatus* Act, which is addressed in the concluding section of this report—purports to deny, limit, or condition the president's authority under Article II of the Constitution to use the military in such homeland defense roles as he may see fit and the circumstances of a WMD attack may necessitate.

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[62] 343 U.S. at 635 (Jackson, J., concurring).

This report briefly will review certain fundamental statutory authorities available to a president in this context, including the Insurrection Act, the Stafford Act, the National Emergencies Act, the Comprehensive Environmental Response, Compensation and Liability Act, and certain public health provisions.

The Insurrection Act

The so-called Insurrection Act generally empowers the president to use the military, either at a state government's request or at his own initiative, to address a variety of civil disturbances that impede the enforcement of the laws. As discussed below, the act is easily broad enough to authorize the president to task the armed forces with a major role in response to a domestic WMD attack.

The Insurrection Act contains three operative sections. Section 331 permits the president, upon the request of a state government, to use the armed forces to suppress an insurrection. This authority, which dates back to 1792 and the Whiskey Rebellion, provides as follows:

> Whenever there is an *insurrection* in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.[63]

Section 332 allows the president to use the armed forces to "enforce the laws" in response to a variety of domestic disturbances, including "unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States." First adopted by Congress at the outset of the Civil War, Section 332 provides as follows:

> Whenever the President considers that *unlawful obstructions, combinations, or assemblages, or rebellion* against the authority of the United States, make it *impracticable to enforce the laws* of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.[64]

Finally, Section 333 authorizes the president to use the armed forces or "any other means" in response to "any insurrection, domestic violence, unlawful combination, or conspiracy" that prevents a state government from enforcing the Constitution or laws of the United States. Adopted during the Reconstruction era, this provision reads in relevant part as follows:

> The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any *insurrection, domestic violence, unlawful combination, or conspiracy*, if it—

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[63] 10 U.S.C. § 331 (1994) (emphasis added).

[64] *Id*. § 332 (emphasis added).

> (1) so *hinders the execution of the laws* of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or
>
> (2) opposes or *obstructs the execution of the laws* of the United States or *impedes the course of justice* under those laws.[65]

The provisions of the Insurrection Act were intended—and have served—as a generous statutory grant of authority to the president to use military forces in times of serious domestic emergency. It has, for example, provided a legal basis for using federal troops to respond to urban riots in 1992, and to desegregate schools in 1957.[66] The circumstances triggering the Act—including "unlawful obstructions," "domestic violence," "unlawful combination," and "conspiracy"—are painted with a very broad brush. As has been discussed, the Supreme Court has made it clear that the question of whether such circumstances exist as may hinder or obstruct enforcement of the laws is a matter committed to the president's sole discretion.[67]

Plainly, the president could rely upon one or more provisions of the Insurrection Act to direct military forces to assume major responsibilities in response to a catastrophic terrorist attack on the United States. The activities of a terrorist network involved in such an attack clearly would constitute an "unlawful combination" or "conspiracy" within the meaning of the act. The attack itself would occasion "domestic violence" on an extraordinary scale, sufficient not simply to hinder or impede but potentially even paralyze the execution of the laws. The broad provisions of the Insurrection Act thus assure that the president would be acting with the sanction of Congress—and that his authority under the Constitution would be "at its maximum"—were he to use the armed forces in response to the dire circumstances contemplated in this report.

The Stafford Act

The Stafford Act authorizes the president to marshal federal resources in support of state and local governments in the event of a major domestic disaster. The federal government's role in providing disaster assistance apparently dates back to 1803, when Congress approved legislation providing assistance to a New

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[65] *Id*. § 333 (emphasis added).

[66] Proclamation No. 3204, 22 Fed. Reg. 7628 (1957) (enforcing court order desegregating schools); Exec. Order No. 10,730, 22 Fed. Reg. 7628 (1957) (same); Proclamation No. 6427, 57 Fed. Reg. 19,359 (1992) (quelling civil disturbances in Los Angeles after the Rodney King assault jury verdict); Exec. Order No. 12,804, 57 Fed. Reg. 19,361 (1992) (same).

[67] See, e.g., *Sterling v Constantin*, 287 U.S. at 399–400; *Luther v Borden*, 48 U.S. at 42–44; *Martin v Mott*, 25 U.S. at 30–31.

Hampshire village following a disastrous fire.[68] The federal government continued providing disaster assistance on an *ad hoc* basis until the passage of the Disaster Relief Act of 1950,[69] in which Congress authorized the president "to coordinate the activities of Federal agencies in such … emergenc[ies]."[70] Subsequent legislation, including the passage of the Stafford Act in 1974 and successive amendments, has continued to strengthen the president's ability to respond to disasters.

Under the Stafford Act, federal agencies may, at the president's direction, perform services essential for preserving public health and safety. The act explicitly recognizes the president's authority to assign DOD a key role in such an effort. At the request of a governor of any state, the president under the Stafford Act may find that a *major disaster* exists—defined as a natural catastrophe or "any fire, flood, or explosion" ("regardless of cause") that occasions "damages of sufficient severity and magnitude to warrant major disaster assistance."[71] In such circumstances, the act permits the president to declare a state of emergency.[72] The statute also authorizes the president to act independently in response to any emergency

> for which the primary responsibility for response rests with the federal government because the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority.[73]

It is clear that terrorists' use of WMD, in various forms, would precipitate a "major disaster" within the meaning of the statute, including a disaster caused by "fire" or "explosion." The president unquestionably has broad discretion to find that a "major disaster" exists, requiring emergency response. Moreover, the statute already has been invoked in response to two major terrorist incidents. President Clinton invoked the act to declare a major disaster and an emergency following

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[68] See *History of the Federal Emergency Management Agency*, at http://www.fema.gov/about/history.htm.

[69] Disaster Relief Act of 1950, Public Law No. 81–875, 64 Stat. 1103 (1950).

[70] H.R. Rep. No. 2727 (1950), quoted in S. Rep. No. 2571, at 1–2 (1950), reprinted in 1950 U.S.C.C.A.N. 4023, 4024.

[71] 42 U.S.C. § 5122(2) (1994). The 1988 amendments adding "regardless of cause" were intended to make it clear that the Stafford Act is *not* limited to a "natural catastrophe" such as a hurricane or tornado. Thus, "[t]he emergency authority would be available in a broader range of situations—epidemics or a sudden influx of political refugees, for example." H.R. Rep. No. 100–517, at 4 (1988), reprinted in 1988 U.S.C.C.A.N. 6085, 6088.

[72] Generally, the emergencies contemplated under the Stafford Act comprise any occasion on which the president determines that that federal assistance is needed to "supplement State and local efforts and capabilities to save lives and protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States." 42 U.S.C. § 5122(1) (1994).

[73] *Id*. § 5191(b).

the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City.[74] More recently, President George W. Bush invoked the act to declare a major disaster following the attack on the World Trade Center in New York City.[75]

Importantly, the Stafford Act does *not* restrict DOD's role in federal response efforts.[76] After declaring an emergency, the president may direct *any* federal agency—including DOD—to

> utilize its authorities and the resources granted to it under Federal law (including personnel, equipment, supplies, facilities, and managerial, technical and advisory services) in support of State and local emergency assistance efforts to save lives, protect property and public health and safety, and lessen or avert the threat of a catastrophe.[77]

This includes providing "technical and advisory assistance" to affected state and local governments for "essential community services" as well as assisting state and local governments in distributing medicine, food, and other supplies.[78]

The Stafford Act thus provides unambiguous authority to the president to take emergency actions in response to domestic catastrophes, including terrorist attacks. If the president directs, the act accommodates a major role for DOD in response. This seems only logical in view of the unique array and depth of "personnel, equipment, supplies, facilities, and managerial, technical and advisory services" that DOD might bring to bear "to save lives" and "protect public health and safety" when circumstances so require.

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[74] Oklahoma; Major Disaster and Related Determinations, 60 Fed. Reg. 21,819 (May 3, 1995) (declaring a major disaster); Oklahoma; Emergency and Related Determinations, 60 Fed. Reg. 22,579 (May 8, 1995) (declaring an emergency).

[75] New York; Major Disaster and Related Determinations, 66 Fed. Reg. 48,682 (Sept. 21, 2001).

[76] To the contrary, the statute even grants the president the authority to utilize DOD on an emergency basis for 10 days *prior* to a presidential declaration of a major disaster or emergency. Following an incident but before the president has declared a major disaster or an emergency, a governor may ask the president to direct the secretary of defense to use DOD resources to perform "any emergency work which is made necessary by such incident and which is essential for the preservation of life and property." 42 U.S.C. § 5170b(c)(l) (1994). The president first must determine that the DOD actions are necessary to preserve life and property. Under the statute, DOD's interim role may not extend beyond 10 days.

[77] *Id*. § 5192(a)(1).

[78] Upon a presidential declaration, the act likewise authorizes the director of the Federal Emergency Management Agency (FEMA) to "direct any Federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under Federal law (including personnel, equipment, supplies, facilities, and managerial, technical, and advisory services) in support of State and local assistance efforts." *Id*. § 5170a. This includes providing technical and advisory assistance for health and safety matters, assisting with the distribution of medicine, food, and consumable supplies, removing debris, and providing temporary housing assistance.

The National Emergencies Act

In the National Emergencies Act of 1974 (NEA),[79] Congress deactivated certain national emergency declarations previously made by the president,[80] and repealed various statutory grants of emergency powers.[81] Enacted in the wake of Vietnam and Watergate, the NEA signified Congress's intent to pare back the large number of statutes that it had previously adopted to authorize different emergency actions by the president. Importantly, however, Congress in the NEA did *not* seek to impose substantive standards that a president must meet in exercising his remaining statutory authorities.[82] Moreover, while "not intended to enlarge or add to Executive power," the NEA addresses only those "powers and authorities made available by statute for use in an emergency"[83] and necessarily left undisturbed such inherent constitutional authority as the president may have in times of crisis.

In Title II, the NEA establishes a procedure for declaring future national emergencies pursuant to acts of Congress authorizing such power.[84] The act provides that the president must immediately transmit his emergency declaration to Congress and publish it in the Federal Register. Congress may terminate a presidential declaration of a national emergency by joint resolution, and Congress must consider a termination every six months after the presidential declaration. Finally, any national emergency declared in accordance with the NEA terminates on the anniversary of its declaration if the president does not publish in the Federal Register and transmit to Congress a notice stating that the emergency will continue.

According to Title III, the president must indicate the powers and authorities being activated when he declares a national emergency.[85] Title IV requires that, when the president declares a national emergency: (1) records must be maintained of all orders issued by the president, (2) executive agencies must keep a record of all rules and regulations issued pursuant to a declaration of national emergency, and (3) the president must transmit all records (including of incurred expenses) to Congress.[86]

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[79] 50 U.S.C. §§ 1601–1651 (1994).

[80] *Id*. § 1601.

[81] *Id*. § 1651.

[82] As the legislative history makes clear, the "definition of when a President is authorized to declare a national emergency … [is] left to the various statutes which give him extraordinary powers"; accordingly, the NEA "makes no attempt to define when a declaration of national emergency is proper." S. Rep. No. 94–1168, at 3, reprinted in 1976 U.S.C.C.A.N. 2288, 2289–91.

[83] *Id*. at 3, 5, 1976 U.S.C.C.A.N. at 2289–92.

[84] 50 U.S.C. §§ 1621–1622 (1994).

[85] *Id*. § 1631.

[86] *Id*. § 1641.

The NEA reflects Congress's judgment that certain procedural requirements were appropriate with respect to the president's exercise of statutory emergency powers. The procedures imposed were of a nature designed to assure accountability and transparency in the president's exercise of these powers. The NEA did *not* revoke bedrock authority contained in other legislation such as the Insurrection Act, as discussed above. Moreover, Congress passed the Stafford Act, the primary statute governing the federal government's response to domestic emergencies, after the NEA. When considered together with these and other statutory grants of emergency authority, the NEA signals Congress's recognition of the president's central role in responding to domestic emergencies and its desire to impose appropriate but not undue constraints on the president's exercise of these powers.

The Comprehensive Environmental Response, Compensation, and Liability Act

The Comprehensive Environmental Response, Compensation, and Liability Act[87] (CERCLA), adopted in 1980, provides important direction to the president concerning the protection of public health and the environment from the "release or substantial threat of release of any pollutant or contaminant." The authorities granted to the president under CERCLA include the following:

> Whenever … there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an *imminent and substantial danger to the public health* or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment.[88]

CERCLA perhaps did not contemplate the intentional release of the lethal radioactive, chemical or biological pollutants or contaminants that would be involved in a WMD attack.[89] Nonetheless, the plain language of the statute is

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[87] 42 U.S.C. §§ 9601–9675 (1994).

[88] *Id*. § 9604(a)(1) (emphasis added).

[89] In the Defense Against Weapons of Mass Destruction Act of 1996, Congress defined WMD as "any weapon or device that is intended, or has the capability, to cause death or serious bodily injury to a significant number of people through the release, dissemination, or impact of (A) toxic or poisonous chemicals or their precursors; (B) a disease or organism; (C) radiation or radioactivity." 50 U.S.C. § 2302(1) (Supp. III 1997). This statute sought to prompt the development of an action plan for federal as well as state and local governments in the event of a WMD attack on the United States. The act recognized, among other things, that DOD's "expertise and capabilities" could make "a vital contribution to the development and deployment of countermeasures against nuclear, biological and chemical weapons of mass destruction." *Id.* § 2301(25).

broad enough to encompass these circumstances,[90] which clearly would pose an imminent and substantial danger to public health requiring an urgent federal response. The nature of that response inevitably would depend upon the situation, and the statute accordingly authorizes the president to take "any response measure" he deems appropriate. While the Environmental Protection Agency reportedly relies upon CERCLA for authority to participate in federal planning for domestic WMD attacks, the statute does not limit the president's options with respect to the use of other departments and agencies (including DOD) that he may deem necessary to protect public health and safety.[91]

Federal Public Health Statutory Authority

Congress has recognized the compelling need for the federal government to help contain epidemics, including the contagion that might result from biological weapons. Congress has directed that the secretary of the health and human services ("HHS") shall "assist States and their political subdivisions in the prevention and suppression of communicable diseases" and "cooperate with and aid State and local authorities in the enforcement of their quarantine and other health regulations."[92]

Congress also has authorized the secretary of HHS to conduct and implement plans "to control epidemics of any disease or condition and to meet other health emergencies or problems."[93] In this connection, the surgeon general is authorized to establish and enforce quarantines "to prevent the introduction, transmission, or spread of communicable diseases" from foreign countries to the United States and from one state to another.[94] The surgeon general also may prescribe regulations that "provide for the apprehension and examination of any individual reasonably believed to be infected with a [specified] communicable disease in a communicable stage" who is crossing or about to cross state lines.[95] Furthermore, "if upon

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[90] The statutory definition of "pollutant or contaminant" focuses on the detrimental effect that given material may have on the environment or on organisms. See 42 U.S.C. § 9601(33) (1994).

[91] 42 U.S.C. § 9604(a)(1) contemplates action consistent with the "national contingency plan" (NCP). The NCP is the federal government's blueprint for responding to oil spills and hazardous substance releases. The NCP does not restrict the president's ability to utilize DOD resources in response to the release of environmental hazards that post a threat to public health and welfare. In fact, the NCP states that federal agencies should "make available those facilities or resources that may be useful in a response situation, consistent with agency authorities and capabilities." 40 C.F.R. § 300.105 (2000).

[92] 42 U.S.C. § 243(a) (1994).

[93] *Id*. § 243(c)(1). To this end, secretary of HHS may "at the request of the appropriate State or local authority, extend temporary (not in excess of six months) assistance to States or localities in meeting health emergencies of such a nature as to warrant Federal assistance." *Id*. § 243(c)(2).

[94] *Id*. § 264(a).

[95] *Id*. § 264(d). The diseases to which this authority may apply must be identified by executive order. *Id*. § 264(b).

examination any such individual is found to be infected, he may be detained for such time and in such manner as may be reasonably necessary."[96]

The authorities granted to HHS to address the grave public health concerns that might arise from a terrorist attack using biological weapons are critically important. They serve to highlight the practical issues that may arise in implementing and enforcing quarantines to control the spread of deadly disease across a broad population. Here, too, circumstances may compel a president to use military forces to help address urgent public health needs. The existing grants of authority do not seek to deny or limit the availability of DOD were the president to call upon it for this purpose.

V. *Posse Comitatus* Act

The so-called *Posse Comitatus* Act expresses a longstanding national policy of appropriately limited application concerning the respective roles of civil and military authority in enforcement of the law.[97] The principle that law enforcement is strictly a civilian function is strong indeed, but it is a principle that yields to the Constitution and to Congress's judgments expressed in other statutes. Outside the area of law enforcement, the *Posse Comitatus* Act has been found to pose no impediment to a wide range of domestic military activities. In the circumstances contemplated by this report, the act would not limit the president's options in using the armed forces in response to a catastrophic terrorist attack on the United States.

Section 1385 of Title 10 of the U.S. Code makes it a crime punishable by fine and imprisonment, "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress," to "willfully use[] any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws."[98]

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[96] *Id*. § 264(d). The secretary of HHS has issued regulations for quarantine of persons who are infected or possibly infected. 42 C.F.R. §§ 71.1– 71.55 (2000). Quarantine authority, including state quarantine legislation, has been upheld by the Supreme Court. *Zemel v Rusk*, 381 U.S. 1, 15–16 (1965) (noting that "[t]he right to travel within the United States is of course also constitutionally protected. But that freedom does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area or the Nation as a whole" (citation omitted)); *Jacobson v Massachusetts*, 197 U.S. 11, 25 (1905) (recognizing the authority of a state to enact quarantine laws and health laws of every description"); *Compagnie Francaise de Navigation a Vapeur v Louisiana State Bd. of Health*, 186 U.S. 380, 387 (1902) (stating that "the power of the states to enact quarantine laws for the safety and protection of their inhabitants … is beyond question").

[97] 18 U.S.C. § 1385 (1994). The term is Latin for "power of the county," and referred at common law to the entire county population aged 15 years or older whom a sheriff could call upon for assistance in keeping the peace or pursuing or arresting criminals. *United States v Hartley*, 796 F.2d 112, 114 n.3 (5th Cir. 1986).

[98] 18 U.S.C. § 1385 (1994). The statute has been interpreted to apply not just to the army and air force but to all the armed services. See *United States v Chon*, 210 F.3d 990, 993 (9th Cir.), cert.

This provision was adopted in its original form in 1878 at the end of the Reconstruction era.[99] From 1866 to 1877, the former Confederate states had remained subject to military rule and federal troops were used in various law enforcement roles.[100] Most controversial of these roles was the supervision of elections, a practice that many Democrats believed had stolen the presidency from their candidate, Samuel Tilden, in 1876. The *Posse Comitatus* Act accordingly was intended to reinstate regular civil authority in the South,[101] and to confine the role of the military to that which had been viewed to be appropriate before the Civil War.[102]

By its terms, the act is subject to two broad exceptions. It does *not* purport to limit the "use" of "any part of the Army or Air Force" to "execute the laws" where "expressly authorized" *either* by the Constitution *or* by "Act of Congress."[103] Moreover, the *Posse Comitatus* Act only applies to certain kinds of military activities involving the exercise of explicit police powers. As discussed below, these limitations on the reach of the *Posse Comitatus* Act are highly significant in their scope.

Constitutional Authorization

The preceding sections of this report demonstrate that the president has certain independent authority under Article II to use those means available to him (including the armed forces when necessary) to respond in a time of serious

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denied, 531 U.S. 910 (2000) (noting that the navy and marines were included by DOD regulation). Nonetheless, the act is not applicable to the coast guard. *United States v Chaparro-Almeida*, 679 F.2d 423, 425 (5th Cir. 1982), cert. denied, 459 U.S. 1156 (1983). Nor does it apply to members of the national guard until they are called into federal service. *Gilbert v United States*, 165 F.3d 470, 473 (6th Cir. 1999); *United States v Hutchings*, 127 F.3d 1255, 1257-58 (10th Cir. 1997).

[99] *Posse Comitatus* Act of 1878, ch. 263 § 15, 20 Stat. 152 (1878) (codified as amended at 18 U.S.C. § 1385 (1994)).

[100] These included, for example, enforcement of the revenue laws and suppression of illegal whiskey production. See *Davis v South Carolina*, 107 U.S. 597 (1883).

[101] Congressman Knott, a sponsor of the legislation, stated that the act was "designed to put a stop to the practice, which has become fearfully common, of military officers of every grade answering the call of every marshal and deputy marshal to aid in the enforcement of the laws." 7 Cong. Rec. 3846, 3849, quoted in 41 Op. Att'y Gen. 313, 330 n. 7 (1957).

[102] Regarding the role of the military before the Civil War, Attorney General Jeremiah S. Black wrote that:

> [T]he President may employ the militia and the land and naval forces for the purpose of causing the laws to be duly executed; but when a military force is called into the field for that purpose, its operations must be purely defensive, and the *military power*, on such an occasion, *must be kept in strict subordination to the civil authority*.

9 Op. Att'y Gen. 516, 517 (1860) (emphasis added).

[103] 18 U.S.C. § 1385 (1994).

domestic emergency and "take Care that the Laws be faithfully executed."[104] The words of the act itself make it clear that Congress did *not* intend to restrict or limit the president's use of military forces "in cases and under circumstances" permitted by the Constitution. Congress could not deprive the president of his inherent constitutional authority to respond to a serious domestic emergency, even if that were its intent. In particular, it seems unlikely that Congress might, by this legislation, criminalize the president's use of his commander in chief powers in aid of his "take Care" responsibilities.

As Attorney General Herbert Brownell Jr. advised President Eisenhower in 1957 in connection with the use of federal troops to desegregate schools in Little Rock, the *Posse Comitatus* Act does not make the federal government "impotent" to respond.[105] "There are," he wrote, "grave doubts as to the authority of the Congress to limit the constitutional powers of the President to enforce the laws and preserve the peace under circumstances which he deems appropriate."[106] It makes no difference that the act excepts only those uses of the military "expressly" authorized by the Constitution.[107] "A power essential to protection against pressing dangers … may well be deemed inherent in the executive office," and such inherent power as the president may have—even if it is construed to extend no further than necessary to achieve the end proposed—cannot be taken away by statute.[108] DOD has adopted regulations concerning the *Posse Comitatus* Act that plainly recognize, in time of emergency, the overriding effect of the Constitution. The regulations are "based upon the inherent legal right of the U.S. Government … to insure the preservation of public order and the carrying out of governmental operations within its territorial limits, by force if necessary."[109]

Statutory Authorization

The second broad exception to the act concerns the use of the army or air force "to execute the laws" in cases or circumstances where this is expressly permitted by

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[104] U.S. Const., Art., II, § 3.

[105] 41 Op. Att'y Gen. 313, 332 (1957).

[106] *Id*. at 331 (citing *In re Debs*, 158 U.S. 564 (1895)); see H.W.C. Furman, *Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act*, 7 Mil. L. Rev 85, 92 (1960) ("the *Posse Comitatus* Act would be unconstitutional if applied to the Commander in Chief").

[107] 18 U.S.C. § 1385 (1994).

[108] *Myers v United States*, 272 U.S. 52, 247 (Brandeis, J., dissenting).

[109] 32 C.F.R. § 215.4(c)(1) (2000). The authority articulated in DOD regulations contemplates "prompt and vigorous Federal action, including use of military forces," in order to, among other things, "prevent loss of life or wanton destruction of property, … restore governmental functioning and public order[, … and] protect Federal property." *Id*. §§ 215.4(c)(1)(i)–(ii). As one commentator has observed, it "would be absurd to require express [statutory] authority in case of sudden invasion, atomic attack, earthquake, fire, flood, or other public calamity before Federal forces could be employed." Furman, *supra* note 106, at 91.

act of Congress.[110] Congress has authorized use of the armed forces for law enforcement in a wide variety of roles, including the following:

- to respond to any of the variety of domestic disturbances contemplated by the provisions of the Insurrection Act, as discussed above;[111]
- to assist in the protection of the president, vice president, members of Congress, and other government officers, as well as foreign officials and international guests;[112]
- in emergency situations involving biological and chemical[113] or nuclear[114] weapons of mass destruction, where civilian law enforcement is not capable of taking action;
- to execute quarantine and health laws;[115] and
- to protect or advance a variety of other compelling federal interests.[116]

Use of the Military to "Execute the Laws"

As has been noted, these broad constitutional and statutory exceptions significantly limit the reach of the *Posse Comitatus* Act. In addition, the statute

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[110] 18 U.S.C. § 1385 (1994).

[111] 10 U.S.C. §§ 331, 332, 333 (1994).

[112] 18 U.S.C. §§ 112, 116, 351, 831, 1116, 1751, 3056 (1994).

[113] Federal criminal laws prohibit, among other things, possession of any "biological agent, toxin, or delivery system for use as a weapon" and the acquisition or use of any chemical weapon. See *id.* § 175; 18 U.S.C. § 229 (Supp. IV 1998). DOD is authorized by statute to "provide assistance in support of Department of Justice activities" where a biological or chemical weapon of mass destruction poses a serious threat and civilian authorities require DOD's capabilities. See 10 U.S.C. § 382 (1994) (biological weapons); 18 U.S.C. § 229E (Supp. IV 1998) (chemical weapons).

[114] 18 U.S.C. § 831 prohibits a wide variety of transactions involving nuclear materials. Under § 831(e), DOD may assist the Justice Department in enforcing these prohibitions in an emergency situation, notwithstanding the provisions of the *Posse Comitatus* Act.

[115] Under this provision, "military officers commanding in any fort or station or seacoast" are required to "aid in the execution" of state quarantine and health laws regarding maritime activity. 42 U.S.C. § 97 (1994).

[116] See 16 U.S.C. § 1861(a) (1994) (use of the armed forces in enforcing the Fishery Conservation and Management Act of 1976); 22 U.S.C. §§ 403, 461–62 (1994) (use of the armed forces in support of neutrality laws); 25 U.S.C. § 180 (1994) (removal of persons unlawfully present on Indian lands); 42 U.S.C. § 1989 (1994) (enforcement of certain civil rights laws); 43 U.S.C. § 1065 (1994) (removal of unlawful enclosures from public lands); 48 U.S.C. § 1422, 1591 (1994) (support of territorial governors if a civil disorder occurs); 50 U.S.C. § 220 (1994) (actions in support of certain customs laws).

applies in terms *only* to use of the military to "execute the laws."[117] In construing this provision of the statute, courts have drawn heavily on the background of the legislation and the evident intent of Congress when it was enacted. The act has been interpreted in a manner consistent with Congress's fundamental objective that military power normally remain subordinate to civilian authority in *law enforcement*.

Thus, certain specific kinds of military activities—but not others—have been found to trigger the act. The statute consistently has been read by our courts to apply *only where*

- there is direct, active use of military personnel,
- that pervades the activities of civilian law enforcement, *and*
- subjects civilians to the exercise of military power that is regulatory, proscriptive, or compulsory in nature.[118]

Outside the context of these explicit police powers, the act has never been thought to apply to a wide range of other military activities.[119] Moreover, Congress has expressly permitted various forms of military assistance to law enforcement,[120] subject to regulatory restrictions that prohibit "direct participation" by members of the armed services in "a search, seizure, arrest, or other similar activity" unless "otherwise authorized by law."[121] For example, DOD may share intelligence collected during "the normal course of military training or operations that may be relevant" to law enforcement.[122] Congress has directed that "[t]he needs of law enforcement for information shall, to the maximum extent practicable, be taken into account in the planning and execution

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[117] 18 U.S.C. § 1385 (1994).

[118] *United States v Hartley*, 678 F.2d 961, 978 n. 24 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983); see also *Hayes v Hawes*, 921 F.2d 100, 103–04 (7th Cir. 1990) (military involvement in a criminal investigation must be of a "pervasive nature" to violate act); *United States v Bacon*, 851 F.2d 1312, 1313 (11th Cir. 1988) (per curiam) (Act triggered only when military participation in an investigation is pervasive and subjects "citizenry to the regulatory exercise of military powers"); *Hartley*, 796 F.2d at 114 (Act prohibits only "direct military involvement").

[119] *United States v Kahn*, 35 F.3d 426, 431-32 (9th Cir. 1994) (no violation of the *Posse Comitatus* Act when the navy provided ships, communication, and aerial reconnaissance to the coast guard for arresting a drug trafficker); *United States v Yunis*, 681 F. Supp. 891, 892 (D.D.C. 1988), aff'd., 924 F.2d at 1086 (no violation when the navy provided necessary support services to the Federal Bureau of Investigation, including materials, supplies, equipment, transport, etc. used to apprehend international terrorist); *Hayes*, 921 F.2d at 101, 103-04 (sharing of information with civilian officials and participating in undercover sting operations); *Hartley*, 796 F.2d at 113–14 (aerial reconnaissance flights and similar activities).

[120] 10 U.S.C. §§ 371–382 (1994).

[121] *Id*. § 375; see 32 C.F.R. §§ 215.1–215.10 (2000).

[122] 10 U.S.C. § 371(a) (1994).

of military training or operations."[123] It has authorized DOD to lend to law enforcement equipment or facilities[124] and to provide associated training for operation of such equipment.[125] DOD personnel may also operate such equipment for various purposes[126] including "a foreign or domestic counter-terrorism operation[.]"[127] While many of these areas of military assistance to law enforcement focus on drug interdiction, the statutes are not limited to this context and thus apply to a wide range of contingencies. Outside the exercise of explicit police powers, Congress accordingly has authorized DOD to perform a wide variety of missions in support of domestic law enforcement.[128]

Moreover, it is clear that the act does not apply where there is an *independent military purpose* that justifies the involvement of military personnel in a law enforcement matter.[129] These purposes would include, for example, investigations that concern violations of law on military bases or within military operations, that relate to the order and discipline of military personnel, or that are necessary to protect military personnel, equipment, or installations.[130]

Conclusion

It perhaps is not surprising, in light of the provisions of the statute, that no one appears to have been convicted of a violation of the *Posse Comitatus* Act in the 123 years since it was first enacted. The policies underlying the act are of great significance but limited application. Even where the act applies, it preserves a broad field of lawful activities to the military apart from the exercise of police powers, including activities in support of law enforcement. Moreover, the explicit exceptions contained in the act assure that it does not preclude even law

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[123] *Id*. § 371(b).

[124] *Id*. § 372.

[125] *Id*. § 373(1).

[126] *Id*. § 374.

[127] *Id*. § 374(b)(1)(C).

[128] It is noteworthy that the DOD Authorization Act for Fiscal Year 2000 permits the secretary of defense to "provide assistance to civil authorities in responding to an act of terrorism or threat of an act of terrorism" and to "waive the requirement for reimbursement." National Defense Authorization Act for Fiscal Year 2000, Public Law No. 106–65, § 1023, 113 Stat. 512, 747 (1999).

[129] The "independent military purpose" standard has been articulated by the secretary of defense pursuant to his rulemaking authority under 10 U.S.C. § 3765 (1994). See DOD Cooperation with Civilian Law Enforcement Officials, Dept. of Defense Directive 5525.5 (Jan. 15, 1986).

[130] See *Chon*, 210 F.3d at 994 (protection and recovery of military equipment stolen from a navy facility constitutes an independent military purpose); *Marrone v Hames*, 28 F.3d 107, at *3 (9th Cir. 1994) (unpublished opinion) (valid military purpose in investigating crimes involving military personnel); *United States v Banks*, 539 F.2d 14, 15–16 (9th Cir.), cert. denied, 429 U.S. 1024 (1976) (*Posse Comitatus* Act "does not prohibit military personnel from action upon on-base violations committed by civilians").

enforcement functions where the president determines these to be essential to the conduct of military operations that are authorized under other statutes or are required to fulfill his obligations under the Constitution.

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